

ARGUMENTS

Applicants are requesting favorable action by the Commissioner in reversal of the present restriction requirement. Applicants believe the restriction requirement is erroneous and improper and, therefore, request reconsideration of the requirement before an election of species can be determined.

In response to the Office Action of November 30, 2000, Paper No. 21, Applicants requested reconsideration of the restriction requirement and for the Examiner to provide clarity in the identification of patentably distinct groups of species to be prosecuted separately on the merits so that Applicants can comply with 35 U.S.C. 121 in the election of species within the elected group. The Examiner indicated that the response was non-responsive for the following reasons:

"The reply filed on 12-26-00 is not fully responsive to the prior Office action because of the following omission(s) or matter(s): Applicant failed to include an identification of the species elected and a listing of claims readable thereon as required on page 3, lines 5-11 and page 4, lines 6-8, regardless of any arguments, discussed infra, provided thereby...Failure to identify and list as required in response this communication will result in the abandonment of the application. Applicant's attention is reinvited to the election requirement including the example set forth on page 4, lines 1-5 of the last Office action, Paper No. 21."

and

"Applicant's remarks and requests filed 12-26-00 have been considered but appear to be drawn to issues regarding restriction between independent inventions while the Examiner's requirement is an election between patentably distinct species, i.e. there are no groups nor groups of claims."

First, Applicants presented in groups the proposed patently distinct species which were identified by the Examiner for subjection to restriction. For example, in the Office Action of November 30, 2000, Paper No. 21, the Examiner identified the species of Figures 9-10 and one of the acquisition layer compositions, e.g. page 18, line 20- page 20, last line and one of the acquisition/distribution layer compositions, e.g., page 21, line 1- page 22, line 25 and one of the second absorbent core component materials and one of the third absorbent core component materials and one of the storage/redistribution layer compositions, e.g., page 22, line 26 - page 24, line 24; or the species of Figures 11-12 and one of the acquisition layer compositions and one of the acquisition/distribution layer compositions and one of the second absorbent core component materials and one of the third absorbent core component materials and one of the storage/redistribution layer compositions; or species of Figures 11 and 13 and one of the acquisition layer compositions, and one of the acquisition/distribution layer compositions and one of the second absorbent core component materials and one of the third absorbent core component materials and one of the storage/redistribution layer compositions. The Examiner then stated "Applicant is required under 35 U.S.C. 121 to elect a single disclosed species for prosecution on the

merits to which the claims shall be restricted if no generic claim is finally held to be allowable. Currently, claims 1 and 33 are generic".

In response to the restriction requirement, Applicants outlined the proposed patently distinct species into groups for consideration and clarification from the Examiner in order for Applicants to comply with 35 U.S.C. 121 in the election of a single disclosed species for prosecution on the merits. For example, Applicants described the proposed patently distinct species as follows: "The Examiner has indicated that Claims 11 and 33 are generic, and then requested applicants to select patently distinct groups which include both of these generic claims. For example, the Examiner identified the following patently distinct groups:

Group I: Claims directed to Figures 9-10 and one of the acquisition layer compositions comprising an absorbent foam and one of the acquisition/distribution layer compositions comprising polymeric foam material and one of the second absorbent core component materials and one of the third absorbent core component materials and one of the storage/redistribution layer compositions comprising fibrous nonwoven materials or polymeric foam materials.

Group II: Claims directed to Figures 11-12 and one of the acquisition layer compositions and one of the acquisition/distribution layer compositions and one of the second absorbent core component materials and one of the third absorbent core component materials and one of the storage/redistribution layer compositions.

Group III: Claims directed to Figures 11 and 13 and one of the acquisition layer compositions and one of the acquisition/distribution layer compositions and one of the second absorbent core component materials and one of the third absorbent core component materials and one of the storage/redistribution layer compositions".

Regardless, whether the proposed patently distinct species are presented in a group or paragraph format, the restriction requirement is erroneous and improper. Applicants submit that the proposed patently distinct species groups identified by the Examiner and by Applicants are identical, and request the Commissioner to reconsider the restriction of Applicants' Claims 11-12, 17, 20, 32-33, 37-39, 43-44, and 82-89 into an election of claims that are not presently pending (Claims directed to Figures 11-12, and to Figures 12 and 13), and to an election that is not in compliance with MPEP 802 and 37 CFR 1.142.

Secondly, according to MPEP 802 and 37 CFR 1.142 a restriction requirement should be based on two or more independent and distinct *claimed* inventions, and the Examiner should require Applicants to elect the invention to which the claims should be restricted. There are no pending claims directed to an acquisition layer comprising only an absorbent foam material, an acquisition/distribution layer comprising only a polymeric foam material, or a storage/redistribution layer comprising only fibrous nonwoven materials or only polymeric foam materials. Furthermore, in the Office Actions of December 2, 1997 (Paper No. 4) and August 24, 1998 (Paper No. 8), the Examiner examined without restriction original Claim 14 which recited "The absorbent article of Claim 11, wherein said first absorbent core component comprises fibrous nonwoven material and open-celled polymeric foam

material" and original Claim 20 which recited "The absorbent article of Claim 11, wherein said second absorbent core component comprises fibrous nonwoven material and open-celled polymeric foam material"; in the Office Action of November 9, 1999 (Paper No. 16) the Examiner examined without restriction amended Claim 12 which recited "The absorbent article of Claim 11, wherein the first absorbent core component comprises a material selected from the group consisting of fibrous nonwoven materials, open-celled polymeric foam materials, absorbent gelling materials, and mixtures thereof", amended Claim 14 which recited "The absorbent article of Claim 12 wherein the material for the first absorbent core component comprises a mixture of fibrous nonwoven materials and open-celled polymeric foam materials", amended Claim 17 which recited "The absorbent article of Claim 11, wherein the second absorbent core component comprises a material selected from the group consisting of fibrous nonwoven materials, open-celled polymeric foam materials, absorbent gelling materials, and mixtures thereof", amended Claim 20 which recited "The absorbent article of Claim 17, wherein the material for the second absorbent core component comprises a mixture of fibrous nonwoven materials and open-celled polymeric foam materials"; and in the Office Action of June 27, 2000 (Paper No. 18) the Examiner again examined without restriction the above-described amended Claims 12, 14, 17 and 20.

The presently pending Claims 12, 17 and 20 are similar to the above-described Claims 12, 17, and 20 in that the present claims also include a Markush group of a few number of closely related materials that can be examined without serious burden on the Examiner. Especially since the Examiner has previously examined numerous times similar claims reciting the same closely related materials without a requirement of a provisional election of a chosen single species within the claims. Therefore, Applicants submit that examination of pending Claims 12, 17, and 20 does not create a serious burden on the Examiner and that these claims should be examined as entire claims without a restriction requirement to elect a chosen species within the claims.

Thirdly, a complete election, as indicated by the Examiner, which includes election of the species of Figures 9-10, an acquisition layer of absorbent foam, an acquisition/distribution layer of open celled absorbent polymeric foam, a second absorbent core component of fibrous wet-laid web materials, a third absorbent core component of fibrous nowoven material, and a storage/redistribution layer of collapsible polymeric foam material is without merit. The claims, pending claims 12, 17, and 20, which recite these materials in combination with other suitable absorbent materials can and have been examined as complete claims. Furthermore, to choose another claim such as independent Claim 11 or dependent Claim 33 and one of the materials of Claims 12, 17, 37, and 86 would unduly burden Applicants to narrow their invention to a selection that restricts to a single chosen species within a set of claims that have been previously examined as being patently *indistinct* species.

In summary, Applicants pending Claims 11-12, 17, 20, 32-33, 37-39, 43-44, and 82-89 are directed to absorbent articles comprising an absorbent core that contains multiple absorbent core components wherein a first absorbent core component provides fluid acquisition and fluid acquisition/distribution performance, and the second and third absorbent core components provide fluid

acquisition, fluid acquisition/distribution, and fluid storage/redistribution performance. The subject matter of these claims read on subject matter of the original and amended original claims which recite absorbent components in fluid communication with each other whereby materials which form the absorbent components are more specifically defined for an understanding of Applicants' invention. Moreover, the subject matter of previously examined claims and the presently pending claims has been repeatedly prosecuted and examined without submitting this subject matter to a restriction requirement. Accordingly, Applicants request reconsideration of the restriction requirement, and favorable action for the presently pending claims to be prosecuted on the merits without further delay in advancing these claims to allowance.

Respectfully submitted,
Gary Dean LaVon et al.

By Joan B. Tucker
Joan B. Tucker
Agent for Applicant
Registration No. 43,962
(513) 626-1811

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Cincinnati, Ohio